STATE OF MICHIGAN

COURT OF APPEALS

JEANNE CORNELL and DAVID EDWARD CORNELL,

Plaintiffs-Appellants,

v

ERP OPERATING LIMITED PARTNERSHIP and EQUITY RESIDENTIAL PROPERTY MANAGEMENT CORPORATION,

Defendants-Appellees,

and

PINES OF CLOVERLANE APARTMENTS,

Defendant.

UNPUBLISHED
September 19, 2006

No. 269331
Washtenaw Circuit Court
LC No. 03-001028-NO

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants-appellees (defendants) summary disposition on their negligence and loss of consortium claims. We reverse and remand.

Defendant ERP Operating Limited Partnership (ERP) owns and defendant Equity Residential Property Management Corporation (Equity) manages the apartment complex in which plaintiffs resided during the circumstances in this dispute, namely the Pines of Cloverlane Apartments (Pines). Plaintiff Jeanne Cornell (plaintiff) was injured when she fell in the apartment parking lot, tripping over the elevation disparity between the parking lot and the sidewalk to her apartment. Plaintiffs allege that the exterior lighting fixtures had been inoperative for weeks and remained so on the night of plaintiff's fall, rendering the area surrounding their apartment "pitch black" on that night.

Plaintiffs argue that the circuit court erred in concluding that application of the open and obvious doctrine is not excepted by the statutory duty embodied in MCL 554.139. We agree. We review rulings on motions for summary disposition de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). Review of a motion under MCR 2.116(C)(10) assesses whether a genuine issue of material fact remains and, if not, whether the moving party is

entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding such a motion, we consider "the pleadings, depositions, admissions, and documentary evidence" in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005). Also, questions of statutory interpretation are reviewed de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). Clear and unambiguous statutory language is given its plain meaning and is enforced as written. *Hines v Volkswagen of America Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

In a common law premises liability action, a duty of care owed by a landowner does not encompass open and obvious dangers on the premises. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Defendants argue the inoperative lighting structures were such an open and obvious condition. This notwithstanding, the open and obvious doctrine does not apply to otherwise limit specific duties created by statute. See *Jones v Enertel, Inc*, 467 Mich 266, 269; 650 NW2d 334 (2002) (holding the open and obvious doctrine is inapplicable to a statutory duty to maintain highways in reasonable repair); *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003).

MCL 554.139 provides, in part, as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
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> > (a) That the premises and all common areas are fit for the use intended by the parties.
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> > (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.
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> (3) The provisions of this section shall be liberally construed . . . . [MCL 554.139(1), (3).]

Pursuant to *Jones* and *O'Donnell*, we must determine whether the parking lot constituted a common area under MCL 554.139(1)(a), thereby imposing on defendants the duty to ensure the exterior lighting illuminating the lot provided adequate lighting to make the lot fit for its intended use. This inquiry operates as a threshold to determining whether the open and obvious doctrine shields defendants from liability.

We recently expanded upon *O'Donnell* in *Benton v Dart Properties Inc*, 270 Mich App 437; 715 NW2d 335 (2006). *Benton* involved a plaintiff's slip and fall on an icy sidewalk in an apartment complex in which the plaintiff resided. *Id.* at 438-439. Observing that "if defendant breached its duties under MCL 554.139, defendant would be liable to plaintiff even if the ice on the sidewalk was open and obvious," *id.* at 441, we addressed the scope of "common areas" under MCL 554.139(1)(a) and its interplay with the open and obvious doctrine.

> [I]n ascertaining whether outdoor sidewalks located within an apartment complex constitute "common areas" under MCL 554.139, we analyze the plain language of the statute. Examining the plain language of MCL 554.139, we conclude that the sidewalks located within an apartment complex constitute "common areas." In so concluding, we are mindful of the statute's mandate that its provisions be construed liberally, MCL 554.139(3). The basis for our conclusion is as follows. First, sidewalks such as the one in question are located within the parameters of the apartment structure. They are constructed and maintained by the landlord or those in the landlord's employ. Second, sidewalks leading from apartment buildings to adjoining parking lots are common areas for tenants because all tenants who own and park their vehicles in the spaces allotted to them by their landlord rely on these sidewalks to access their vehicles and apartment buildings. Additionally, any person residing in an apartment complex must utilize the sidewalk provided by the landlord every time the tenant wishes to enter or exit his or her dwelling. Therefore, the sidewalks constitute common areas used by tenants.
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> We conclude that sidewalks, such as the one used by plaintiff, constitute "common areas" under MCL 554.139(1)(a). Therefore, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose. Thus, under our holding in *O'Donnell*, defendant owed plaintiff a duty of reasonable care regardless of the openness or obviousness of the icy sidewalk conditions. [*Id.* at 442-444.]

As we concluded in *Benton*, the plain language of MCL 554.139(1)(a) compels the conclusion that the parking lot at issue constituted a common area of Pines. Clear legislative intent dictates that this provision be construed liberally. MCL 554.139(3). Though not statutorily defined, common area has been defined as "[t]he realty that all tenants may use though the landlord retains control and responsibility over it." Black's Law Dictionary (7th ed), p 268. The parking lot is owned by defendant ERP and managed by defendant Equity. It is apparent that the parking lot is located in the parameters of the apartment structure. *Benton, supra* at 442. It is plainly used by tenants generally "to access their vehicles and apartment buildings." *Id.* at 443. Further, it is plain that providing adequate lighting at night is part of maintaining such a parking lot in a manner fit for the use intended by the parties. MCL 554.139(1)(a). A reasonable person would have to expect that tenants would routinely walk to and from their vehicles in the parking lot at night. In order to be fit for the tenants to do so, the parking lot would need to have adequate lighting for such tenants to safely see where they are

walking. Accordingly, as the landlord in *Benton* had a duty to take reasonable measures to ensure the fitness of sidewalks in its apartment complex, defendant in this case had a duty to take reasonable measures to ensure the parking lot at issue was fit for its intended use, including reasonable measures to keep it adequately illuminated at night. This duty was owed despite the openness or obviousness of the complete absence of lighting in the parking area. *O'Donnell, supra* at 581.

Defendants argue that the *Benton* Court's analysis fails to account for the statutory distinction between "fit for the use intended by the parties" and "reasonable repair." Because MCL 554.139(1) contemplates both in relation to leased premises, but not to common areas, defendants maintain that the former cannot encompass routine maintenance of the common area lighting structures, i.e. light bulb replacement. Pursuant to MCL 554.139(1), defendants have covenanted to maintain the common areas fit for their intended use, but not in reasonable repair. Their argument is thus accurate to an extent. For example, the failure of one or more lighting fixtures would likely not render a parking area inadequately illuminated and therefore the parking lot unfit for its intended use. It is indeed probable that the remaining structures would suffice to adequately illuminate a tenant's path. Nevertheless, the failed fixtures would clearly not be "in reasonable repair." They would be inoperative. The distinction embodied in MCL 554.139 imposes a higher duty in relation to leased premises as opposed to common areas, requiring general reasonable repairs for the former, while permitting a sliding scale of fitness for the latter until it is rendered unfit for its intended use.

Defendants further argue that *Benton* conflicts with a prior published decision of this Court, *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005), and that under the first-out rule, MCR 7.215(J)(1), we are obligated to reject *Benton* in favor of *Teufel*. The alleged conflict defendants point to involves a determination of whether the accumulation of snow and ice renders an apartment premises or common area unfit for its intended use under MCL 554.139(1)(a). Compare *Benton, supra* at 444, with *Teufel, supra* at 429 n 1. This is unrelated to the issue before us. We therefore decline to address whether such a conflict exists. Even assuming such a conflict, *Benton* would remain persuasive authority as to our analysis of whether the Pines parking lot is a common area under MCL 554.139(1)(a). Cf. *Horace v City of Pontiac*, 456 Mich 744, 754-755; 575 NW2d 762 (1998) (noting that, though our Supreme Court's reversal of an opinion from this Court on one ground rendered unrelated but unnecessarily addressed issues dicta, that opinion remained persuasive for subsequent analysis). We find its reasoning persuasive. And absent *Benton*, we would still conclude that the parking lot at issue is a common area of Pines under MCL 554.139(1)(a). This is the clear mandate of the statutory language.

With the foregoing in mind, we conclude that plaintiffs have created a genuine issue of material fact as to whether defendants breached their duty to maintain the parking lot fit for its intended use. *West, supra* at 183. Plaintiffs alleged and presented evidence that the lighting fixtures at issue were wholly inoperative, rendering the area "pitch black." This evidence indicates that the exterior lighting was unfit for its intended use. Plaintiffs alleged and presented evidence that they repeatedly informed defendants of the defects weeks prior to plaintiff's injury, though no action was taken. Viewed in the light most favorable to plaintiffs, *Nastal, supra* at 721, this evidence tends to illustrate that defendants breached their duty of reasonable care to ensure the parking lot was fit for its intended use. *Benton, supra* at 444. Reasonable minds

could certainly conclude that defendants' inaction was a breach of its duty. Summary disposition was thus improperly granted.

Because of our resolution of the foregoing, we decline to address plaintiffs' remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio